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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, WALKER RIVER PAIUTE TRIBE, Plaintiff-Intervenor, vs. WALKER RIVER IRRIGATION DISTRICT, a corporation, et al., Defendants.	3:73-CV-00127-MDD-WGC **JOINT MOTION FOR JUDGMENT ON THE PLEADINGS**

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Pursuant to Rule 12(c), Fed. R. Civ. P., the United States of America (United States) and the Walker River Paiute Tribe (Tribe) (collectively, Plaintiffs) jointly move for judgment on the pleadings. In general, various Defendants have asserted common affirmative defenses to Plaintiffs' water right claims: (1) laches; (2) estoppel/waiver; (3) no reserved rights to groundwater; (4) the United States is without the power to reserve water rights after Nevada's statehood; and (5) claim and issue preclusion. These claimed defenses are without merit as a matter of law as explained in the Memorandum of Points and Authorities provided. Plaintiffs are entitled to judgment now.[1]

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This action was initiated in 1924.[2] Today, Plaintiffs seek recognition of additional water rights not addressed by the 1936 Decree pursuant to this Court's authority to modify the Decree.[3]

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[1] Defendants frequently made identical assertions labeled as "affirmative defenses" in their Answers of August 2, 2019. Whether these positions are actually affirmative defenses or are legal assertions designed to defeat Plaintiffs' water rights claims, they offer Defendants no basis for relief, are not subject to discovery or factual development, and can be resolved now as a matter of law. Plaintiffs identify in Exhibit 1 each affirmative defense that is the subject of this Motion.

[2] This lengthy case can be briefly summarized. The first published opinion was *United States v. Walker River Irr. Dist.*, 11 F. Supp. 158 (D. Nev 1935) ("*Walker I")*, followed by the district court's supplemental published opinion, *United States v. Walker River Irr. Dist.*, 14 F. Supp. 10 (D. Nev 1936) ("*Walker II").* The Ninth Circuit reversed in part the district court's decision, and the decree originally entered in 1936 was amended accordingly in 1940. *United States v. Walker River Irr. Dist.*, 104 F.2d 334 (9th Cir. 1939) ("*Walker III"*). This Decree, as amended, is commonly referred to as the "1936 Decree." For almost eighty years, the case remained in the district court subject to the court's retained jurisdiction; but in 2018, the Ninth Circuit reversed the district court's decision to dismiss all pending water rights claims asserted by the United States and the Tribe. *United States v. Walker River Irr. Dist.*, 890 F.3d 1161 (9th Cir. 2018) ("*Walker IV"*). More detail about the circumstances of this case are summarized in these published decisions.

Plaintiffs first made the water right claims at issue today almost thirty years ago.[4] Plaintiffs assert reserved federal water rights, or *Winters* Rights, for the benefit of the Tribe and to fulfill the purpose of the Walker River Indian Reservation ("Reservation") as the Tribe's permanent homeland.

Federal reserved water rights, or *Winters* Rights, refers to those water rights that arise under the *Winters* Doctrine.[5] The Doctrine stands for the proposition that when a reservation is set aside for an Indian tribe, sufficient water is reserved to accomplish the purposes of the reservation.[6] These reservations have been interpreted broadly as establishing a homeland and self-sustaining Indian community,[7] including reservation of the then-unappropriated water necessary to fulfill that purpose. A tribe retains all rights not expressly ceded in the documents establishing the reservation, including its aboriginal rights to water.[8]

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[3] *See Walker IV*, 890 F.3d at 1169-72.

[4] *Amended Counterclaims of the United States* (ECF No. 59) and the *Amended Counterclaims of the Walker River Paiute Tribe* (ECF No. 58).

[5] *Winters v. United States*, 207 U.S. 564, 28 S. Ct. 207, 52 L. Ed. 340 (1908).

[6] *Id.* at 576-77; *Cappaert v. United States*, 426 U.S. 128, 139, 96 S. Ct. 2062, 48 L. Ed. 2d 523 (1976); *Arizona v. California*, 373 U.S. 546, 597-602, 83 S. Ct. 1468, 10 L. Ed. 2d 542 (1963) ("*Arizona I*").

[7] *Winters*, 207 U.S. at 565; *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 849 F.3d 1262, 1265, 1270 (9th Cir.), *cert. denied*, 138 S.Ct. 468 (2017),

[8] *See United States v. Winans*, 198 U.S. 371, 381, 25 S. Ct. 662, 49 L. Ed. 1089 (1905) (treaties are "not a grant of rights to the Indians, but a grant from them – a reservation of those not granted"); *United States v. Adair*, 723 F.2d 1394, 1408-10, 1413-17 (9th Cir. 1983) (applying *Winters* Doctrine and recognizing that the Klamath Tribes' 1864 Treaty "confirmed" the continued existence of all rights not expressly ceded, including aboriginal rights to water) ("*Adair II*"); *see also United States v. Wheeler*, 435 U.S. 313, 327 n.24, 98 S. Ct. 1079, 55 L. Ed 2d 303 (1978).

Plaintiffs seek recognition of these tribal water rights, upon which in large part the Tribe has depended for scores of years already. These rights include the right to store and use water as the Tribe has since the construction of Weber Dam (started in 1933 and completed several years later) and the right to use water for domestic purposes, for stock purposes, and for limited, potential economic activities both now and in the future. Plaintiffs assert these reserved water rights to ensure that the Tribe has sufficient water to maintain a permanent homeland on its Reservation, to quantify the amount of water reserved for the Tribe, and to ensure that the Tribe has the ability to protect these rights from interference by junior water users in the Walker River Basin. The Court's task now is straightforward: determine if the rights claimed exist and, if they do, the amount of water to be accorded those rights.

Pursuant to the *Stipulated Scheduling Order and Discovery Plan* ("Scheduling Order"),[9] Plaintiffs filed updates and amendments to their water right claims as well as a more detailed statement concerning those amended claims.[10] In their Amended Counterclaims, Plaintiffs continue to assert the same three, core water right claims that they first asserted decades ago: (1) a storage water right associated with Weber Reservoir; (2) a groundwater right associated with lands added to the Reservation by Executive and Congressional action in 1918, 1928, 1936, and 1972, with the Tribe also claiming surface water rights to serve the 1928, 1936, and 1972 land additions to the Reservation; and (3) a groundwater right underlying all lands within the exterior

[9] ECF No. 2437.

[10] *United States' Detailed Statement of Water Right Claims on Behalf of the Walker River Paiute Indian Tribe* (ECF No. 2476-1); *Amended Counterclaim of the United States of America for Water Rights Asserted on Behalf of the Walker River Paiute Indian Tribe* (ECF No. 2477-1); *Second Amended Counterclaim of the Walker River Paiute Tribe* (ECF No. 2479).

boundaries of the Reservation, some of which have been held in trust by the United States for the Tribe since 1859.

Defendants, in their answers to the Amended Counterclaims, leveled a host of assertions labeled "Affirmative Defenses."[11] This Motion focuses on five such alleged defenses: (1) laches; (2) estoppel/waiver; (3) that the reserved rights doctrine does not apply to groundwater; (4) that the United States lacks authority to reserve water rights after statehood; and (5) claim/issue preclusion.[12] As explained below, under the undisputed circumstances of this case, each of these defenses is either unavailable to defeat the Amended Counterclaims or contrary to binding law. Therefore, Plaintiffs are entitled to judgment on the pleadings and dismissal of these affirmative defenses.

II. APPLICABLE LEGAL STANDARD

Fed. R. Civ. P. 12(c) provides: "[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." Consistent with the Scheduling Order, Plaintiffs filed their Amended Counterclaims and Defendants filed their answers to the Amended Counterclaims in 2019. These Amended Counterclaims and answers constitute the "pleadings" as that term is used in Fed. R. Civ. P. 7(a). A motion under Fed R. Civ. P 12(c) is "functionally identical" to a Rule 12(b)(6) motion, and "'the same standard of review' applies to

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[11] *See* Exhibit 1 identifying those answers filed against Plaintiffs' water right claims and asserting affirmative defenses that are subject to this Motion.

[12] Laches, estoppel/waiver, and claim/issue preclusion may be properly viewed as affirmative defenses constituting defenses to the Plaintiffs' water right claims even if those claims were otherwise valid. The other two defenses are merely legal assertions designed to defeat Plaintiffs' water right claims. Regardless of how Defendants have labeled them, each of these affirmative defenses lack legal support and should be dismissed now.

motions brought under either rule."[13] A judgment on the pleadings is properly granted "when, accepting all factual allegations in the complaint as true, there is no issue of material fact in dispute, and the moving party is entitled to judgment as a matter of law."[14]

III. ARGUMENT

A. Equitable defenses do not bar Plaintiffs' federal reserved water right claims.

The United States and the Tribe assert federal reserved water rights to both surface water and groundwater. Defendants allege in their answers that Plaintiffs' water rights claims are subject to equitable defenses, namely, laches and estoppel/waiver.[15]

Laches is an equitable defense that limits the time in which a party may bring suit and derives from the maxim that a party who sleeps on his rights loses them.[16] To establish laches, the moving party assumes the validity of the underlying claim and seeks to establish that the claimant failed to diligently pursue that claim, resulting in prejudice to the moving party.[17]

Estoppel is an equitable defense that prohibits one party from breaking promises upon which another party has detrimentally relied and derives from the principle that a party should not be allowed to benefit from its own wrongdoing.[18] Like laches, a party asserting estoppel

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[13] *Gregg v. Hawaii Department of Public Safety*, 870 F.3d 883, 887 (9th Cir. 2017) (quoting *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1054 n.4 (9th Cir. 2011)).

[14] *Chavez v. United States*, 683 F.3d 1102, 1108 (9th Cir. 2012).

[15] *See* Exhibit 1.

[16] *See e.g., Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 835 (9th Cir. 2002); *Miller v. Glenn Miller Prods., Inc.*, 454 F.3d 975, 997 (9th Cir. 2006).

[17] *Save the Peaks Coal v. U.S. Forest* Service, 669 F.3d 1025, 1031 (9th Cir. 2012).

[18] *Bolt v. United States*, 944 F.2d 603, 609 (9th Cir. 1991); *Collins v. Gee West Seattle LLC*, 631 F.3d 1001, 1004 (9th Cir. 2011).

assumes the underlying claim is valid and seeks to demonstrate the existence of tangential facts and circumstances that preclude a plaintiff from asserting an otherwise valid claim. Related to estoppel is the defense of waiver. This defense "is ordinarily an intentional relinquishment or abandonment of a known right or privilege."[19]

These equitable defenses are unavailable when the United States or an Indian tribe seeks a formal determination of *Winters* Rights. As explained in the next three subsections, the United States Supreme Court and the Ninth Circuit have repeatedly ruled that equitable defenses are not available to defeat or limit tribal claims to water rights or other reserved rights. This well-settled legal principle, as affirmed by the law-of-the-circuit, precludes the equitable defenses raised by the Defendants and binds this Court.[20] This should be the end of the matter, but opponents of *Winters* Rights (like Defendants here) repeatedly assert equitable defenses, pounding their fists against the solid wall of law in hopes that, one day, a crack appears to allow them to engage in a broad trial on the equities.[21] At bottom, Defendants assert that, based on the equities, their junior

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[19] *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938); *see also United States v. Washington*, 853 F.3d 946, 966 (9th Cir. 2016) ("Washington asserted a defense of 'waiver and/or estoppel' based on action and inaction of the United States," leading the state to believe its conduct lawful).

[20] *Hart v. Massanari*, 266 F.3d 1155, 1170 (9th Cir. 2001) ("[C]aselaw on point *is* the law. If a court must decide an issue governed by a prior opinion that constitutes binding authority, the later court is bound to reach the same result, even if it considers the rule unwise or incorrect. Binding authority must be followed unless and until overruled by a body competent to do so.") (emphasis in original).

[21] In their struggle to secure an equities trial, opponents, such as Defendants, often lose sight of the fact that an equities analysis involves a consideration of *all* circumstances – not just non-Indian circumstances. Such circumstances would include those wrongs and losses that may have been suffered by an Indian tribe and those circumstances illustrating how Indians may have been taken advantage of by the surrounding non-Indian community. Such circumstances certainly exist with respect to the Walker River Paiute Tribe, including the actions taken by water users upstream of the Reservation that prompted the original complaint in this case, and would certainly be the subject of any equitable analysis. The potential for an expansive trial on such

water rights should prevail over senior water right holders, the United States and the Tribe. Below Plaintiffs set forth the legal wall that prohibits what Defendants seek – an equities trial.

1. Equitable defenses do not apply to *Winters* Rights claims.

The Supreme Court has long held that equitable defenses do not apply to the United States when acting in its sovereign capacity.[22] This rule was initially recognized by the Supreme Court in the context of federal lands and other property[23] and later expanded to whenever the United States acts in its sovereign capacity.[24] The rule applies equally to the United States when it seeks to protect Indian lands and property held in trust by the United States for the benefit of

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divisive and controversial circumstances illustrates why equitable analysis is plainly inappropriate in the determination of the existence and quantification of *Winters* Rights established under federal law.

[22] *See e.g.*, *United States v. California*, 332 U.S. 19, 39, 67 S. Ct. 1658, 91 L. Ed. 1889 (1947); *United States v. Summerlin*, 310 U.S. 414, 416, 60 S. Ct. 1019, 84 L. Ed. 1283 (1940).

[23] *See United States v. Thompson*, 98 U.S. 486, 490-91 (1878) (citing early cases); *United States v. Beebe*, 127 U.S. 338, 344, 8 S. Ct. 1083, 32 L. Ed. 121 (1888) ("The principle that the United States are not bound by any statute of limitations, nor barred by any laches of their officers, however gross, in a suit brought by them as a sovereign government to enforce a public right, or to assert a public interest, is established past all controversy or doubt . . . ."); *see also Lake Berryessa Tenants' Council v. United States*, 588 F.2d 267, 271 (9th Cir. 1978) ("The Government . . . and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act.").

[24] *See United States v. Nashville Ry. Co.*, 118 U.S. 120, 126, 6 S. Ct. 1006, 30 L. Ed. 81 (1886) (applying the principle to financial instruments held by the United States); *In re Debs*, 158 U.S. 564, 584, 15 S. Ct. 900, 39 L. Ed. 1092 (1895) ("Every government, [e]ntrusted by the very terms of its being with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter.").

tribes, based on the United States holding the underlying property interest.[25] In *Heckman v. United States*, the Supreme Court clarified that the United States had standing to protect Indian property interests based on either its government interests, "fulfilment of which the national honor has been committed," or its underlying federal property interests.[26] As a result, when the United States seeks to protect tribal property interests, as it does here, the United States acts in both its sovereign capacity and as the protector of its property and is not subject to equitable defenses such as laches.

No question exists that the Reservation is held in trust by the United States. And, whether claimed by the United States or the Tribe, any water right that might exist is held by the United States as trustee for the Tribe with the Tribe holding the beneficial interest in the same right.[27] Supreme Court precedent establishes that equitable defenses are unavailable against the United States when it claims such property interests as *Winters* Rights on behalf of a Tribe. As a

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[25] *Board of Com'rs of Jackson County v. United States*, 308 U.S. 343, 351, 60 S. Ct. 285, 84 L. Ed. 313 (1939) ("[S]tate notions of laches … have no applicability to suits by the Government, whether on behalf of Indians or otherwise.").

[26] *Heckman v. United States*, 224 U.S. 413, 437–38, 32 S. Ct. 424, 56 L. Ed. 820 (1912).

[27] "With respect to reserved water rights on Indian reservations, these federally-created rights belong to the Indians rather than to the United States, which holds them only as trustee." *Shoshone Bannock Tribes v. Reno*, 56 F.3d 1476, 1479 (D.C. Cir. 1995). Thus, "[t]he United States, as trustee for the Tribes, may bring suit on their behalf to enforce the Tribes' rights, *but the rights belong to the Tribes*." *United States v. Washington*, 853 F.3d 946, 967 (9th Cir. 2017) (emphasis added), *aff'd by an equally divided court*, 138 S. Ct. 735 (2018); *see also Agua Caliente Band of Mission Indians v. Riverside City.*, 442 F.2d 1184, 1186 (9th Cir. 1971) ("An Indian, as the beneficial owner of lands held by the United States in trust has a right acting independently of the United States to sue to protect his property interests."); *Swim v. Bergland*, 696 F.2d 712, 718 (9th Cir. 1983) (holding that laches or estoppel were not available against an Indian tribe to defeat the tribe's reserved treaty rights). COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (2005) § 19.04[2] at 1238 ("Reserved rights to water are property rights held by tribes and their members.").

general matter, therefore, Defendants' equitable defenses are not available against Plaintiffs' *Winters* Rights claims and Plaintiffs are entitled to judgment on the pleadings.

2. The Supreme Court has expressly rejected that *Winters* Rights can be denied or limited based upon equitable considerations.

As mentioned above, the rights asserted by Plaintiffs in this case are *Winters* Rights jointly held by Plaintiffs. In *Winters*, the Supreme Court held that federal law impliedly reserved water rights for the Fort Belknap Reservation, which was intended to be the permanent homeland for the Gros Ventre and Assiniboine Tribes. In doing so, the Court firmly rejected that equitable balancing of any kind is appropriate in determining rights impliedly reserved for an Indian tribe under federal law. The Court reached this conclusion notwithstanding the non-Indian defendant settlers' contentions that affirming federal water rights for a permanent tribal homeland would have devastating consequences for non-Indians, that the waters at issue were indispensable to them, that their lands would be ruined, that it would be necessary to abandon their homes, and that they would be greatly and irreparably damaged if the Court recognized tribal water rights.[28] But the Court squarely rejected these arguments and took *no* consideration of these equitable allegations.[29]

In rejecting these equitable claims, the Court observed that "[the] Indians had command of the lands and the waters, command of all their beneficial use, whether kept for hunting, 'and grazing roving herds of stock,' or turned to agriculture and the arts of civilization."[30] "Did they

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[28] *Winters*, 207 U.S. at 573.

[29] *Id*. at 577.

[30] *Id*. at 576.

give up all this?" the Court asked, rhetorically.[31] "Did they reduce the area of their occupation and give up the waters which made it valuable or adequate?"[32] The Court concluded that they did not:

> [I]t would be extreme to believe that … Congress destroyed the reservation and took from the Indians the consideration of their grant, leaving them a barren waste, – took from them the means of continuing their old habits, yet did not leave them the power to change to new ones.[33]

The *Winters* Court, therefore, closed the door to a trial on the equities.

The Supreme Court next considered *Winters* Rights in *Arizona v. California,* which addressed the *Winters* Rights of five Indian tribes with reservations along the lower Colorado River main-stem.[34] The Court rejected Arizona's argument that the doctrine of equitable apportionment should be used to divide water between Indians and others.[35] The Court held that, rather than being controlled by equitable considerations, the federal Indian reserved water rights were "governed by the [federal] statutes and Executive Orders creating the reservations."[36] Again, the Court squarely rejected the State's arguments, took *no* consideration of equitable circumstances, and recognized a senior water right sufficient for a permanent homeland, even though those rights for the most part had yet to be exercised.

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[31] *Id*.

[32] *Id*.

[33] *Id*. at 577.

[34] 373 U.S. at 596-601 ("*Arizona I*").

[35] *Id.* at 596-97.

[36] *Id.* at 597; *see also Arizona v. California*, 460 U.S. 605, 616, 103 S. Ct. 1382, 75 L. Ed. 29 318 (1983) ("*Arizona II*") (noting that in *Arizona I* "[t]he question of Indian water rights" was "decided by recourse to Congressional policy rather than judicial equity").

Finally, in *Cappaert v. United States*, the Supreme Court rejected the application of equitable considerations in the context of federal reserved water rights for a National Park.[37] There, the State of Nevada argued that the *Winters* Doctrine was an equitable one that called for a "balancing of competing interests," which the Court flatly rejected. [38] The Court found that no prior *Winters* Doctrine case had applied such a balancing test[39] and unequivocally held that "balancing the equities is not the test."[40] Instead, the Court found that the *Winters* Rights were determined and quantified based solely on the purposes of the federal reservation, without reference to the needs of competing water users.[41]

Without exception, the Supreme Court has repeatedly and squarely rejected any equitable balancing in conjunction with recognizing a *Winters* Right. Accordingly, Defendants' asserted equitable defenses to Plaintiffs' *Winters* Rights claims—laches and estoppel/waiver—must fail, and Plaintiffs are entitled to judgment on the pleadings.

3. The Ninth Circuit has expressly held that *Winters* Rights cannot be denied or limited based upon equitable defenses or equitable balancing.

Like the Supreme Court, the Ninth Circuit has also held that equitable considerations are inapplicable when the United States acts in its trust capacity on behalf of an Indian tribe. More specifically, binding circuit case law rejects equitable considerations and defenses where the

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[37] 426 U.S. at 138-39.

[38] *Id.* at 138.

[39] *Id.*

[40] *Id.* at 139 n.4. Given the Supreme Court's previous, specific rejection of Nevada's equitable defense argument, it is perplexing that the State finds itself unconstrained to again raise the same rejected defense here. *See Nevada Department of Wildlife's Answer to Second Amended Counterclaim* (ECF No. 2547) at 5 (asserting equitable defenses).

[41] *Cappaert*, 426 U.S. at 141.

United States and Indian tribes seek recognition or the protection of *Winters* Rights and other reserved rights. The Ninth Circuit has reiterated again and again the unavailability of equitable defenses in this context; Plaintiffs identify a few of these cases below.

a. In this case, the Ninth Circuit expressly rejected the notion that *Winters* Rights claims are subject to equitable defenses.

More than eighty years ago, *in this very case*, the Ninth Circuit rejected the application of equitable defenses in the context of *Winters* Rights. The law-of-the-case doctrine, therefore, dictates that "a court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case."[42]

As outlined above, the United States initiated this action in 1924 when it filed suit to establish *Winters* Rights on behalf of the Tribe. In 1936, the district court denied the United States' *Winters* Rights claims entirely.[43] In doing so, the district court recited the many circumstances that occurred since the establishment of the Reservation in 1859.[44] Notably, the court balanced perceived equities and emphasized the United States had encouraged non-Indian irrigation and water development.[45] In its second opinion, the district court went further to emphasize that the equitable defenses raised against the United States defeated the United States' claim.[46] The district court reemphasized the circumstances showing hardship on non-Indian water users and concluded "this court is of the opinion that the facts and circumstances

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[42] *Thomas v. Bible*, 983 F.2d 152, 154 (9th Cir. 1993), *cert. denied*, 508 U.S. 951 (1993).

[43] *Walker I*, 11 F. Supp. at 163-65.

[44] *Id.*

[45] *Id.* at 165 (Among the many circumstances emphasized, the district court seized on the amount of irrigated land then irrigated by non-Indians and the estimated value of such investments.).

[46] *Walker II*, 14 F. Supp. at 10.

have placed the white settlers in an inexpugnable position . . . . Under [these] such facts and circumstances this court is not moved to give a decree destroying the rights of the white pioneers."[47]

But the Ninth Circuit squarely reversed this myopic, settler-focused conclusion. The court rejected objectors'[48] estoppel claim as unavailable:

> Appellees point to the heavy expense of reclaiming their lands and to the conduct of the Government in permitting and encouraging settlement . . . . They urge on these grounds that the Government is estopped to question the priority of their appropriations. Similar arguments were made unavailingly in *Winters v. United States*. The settlers who took up lands in the valleys of the stream were not justified in closing their eyes to the obvious necessities of the Indians already occupying the reservation below.[49]

Today, Defendants once again seek to elevate their junior water rights above the Tribe's senior federal reserved water rights based on equitable defenses. The Ninth Circuit already rejected equitable defenses in this case. The law-of-the-case doctrine dictates that this Court is precluded from reconsidering this issue.[50]

b. Additional Ninth Circuit precedent prohibits application of equitable defenses to the enforcement of *Winters* Rights.

Following the *Walker III* decision, the Ninth Circuit has consistently prohibited application of equitable defenses when the United States acts in its trust capacity on behalf of a Tribe. In *United States v. Ahtanum Irrigation District*, a suit from the 1950s challenging the existence of a *Winters* Right, the Court ruled that "[n]o defense of laches or estoppel is available

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[47] *Id.*

[48] Defendants from *Walker I* raising estoppel in the 1920s/30s include some of the same active Defendants appearing today, most notably Defendant Walker River Irrigation District.

[49] *Walker III*, 104 F.2d at 339.

[50] *See Thomas*, 983 F.2d at 154; *United States v. Cuddy*, 147 F.3d 1111, 1114 (9th Cir. 1998).

to the defendants here for the Government as trustee for the Indian Tribe, is not subject to those defenses."[51] Moreover, binding circuit case law rejects equitable considerations where the United States and Indian tribes seek recognition or protection of *Winters* Rights and other reserved rights.[52]

In *Colville Confederated Tribes v. Walton*, the Ninth Circuit explicitly rejected the proposition that equitable considerations and junior water user impacts might limit *Winters* Rights:

> The district court feared that the Tribe, by utilizing its *Winters* rights for the Omak Fishery, would dilute the water rights off the Indian allottees and their [non-Indian] successors (e.g., Walton). This merely reflects the tension between the doctrines of prior appropriation and Indian reserved rights. Where reserved rights are properly implied, *they arise without regard to equities* that may favor competing water users.[53]

Equitable considerations were raised again in *Joint Board of Control of Flathead Mission and Jocko Irrigation Districts v. United States*.[54] There, irrigators challenged the Bureau of Indian Affairs' ("BIA's") management of an irrigation project in order to provide federal reserved instream flows and reservoir levels for the Flathead Tribe's fisheries.[55] The

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[51] 236 F.2d 321, 334 (9th Cir. 1956) (*Ahtanum*).

[52] The Ninth Circuit expressly held that laches or estoppel is not available against an Indian tribe to defeat the tribe's reserved treaty rights. *Swim,* 696 F.2d at 718 (*citing Board of Comm'rs of Jackson City. v. United States*, 308 U.S. 343, 351 (1939), *and Ahtanum*, 236 F.2d at 334).

[53] *Colville Confederated Tribes v. Walton*, 752 F.2d 397, 405 (9th Cir. 1985) ("*Walton III*") (emphasis added).

[54] 832 F.2d 1127 (9th Cir. 1987).

[55] The BIA protected the federal reserved rights even though those claims had yet to be adjudicated. *Id.* at 1129.

Ninth Circuit found that the United States held a reserved right for the Tribe.[56] The court again rejected an equities-based analysis:

> [T]he Joint Board contended that the law would not permit the tribal fisheries to be protected in full if the result was to deprive a much larger number of farmers of the water needed for irrigation. This contention ignores one of the fundamental principles of the appropriative system of water rights. '*Where reserved rights are properly implied, they arise without regard to equities that may favor competing water users*.' [quoting *Walton III*]. To the extent that the Tribes enjoy treaty-protected aboriginal fishing rights, they can 'prevent other appropriators from depleting the streams (sic) waters below a protected level.' [quoting *Adair II*].[57]

Again in *United States v. City of Tacoma*, the Ninth Circuit rejected the availability of equitable defenses in the context of a suit by the United States on behalf of the Skokomish Indian Tribe to invalidate a 1921 state court judgment that condemned tribal land.[58] The City raised equitable defenses against the United States for waiting almost a century to bring the challenge.[59] The court rejected the City's contention: "[T]here can be *no argument* that equitable estoppel bars the United States' action because, when the government acts as trustee for an Indian tribe, [the United States] *is not at all* subject to that defense."[60]

Finally, and most recently, the Ninth Circuit reiterated the prohibition of equitable defenses against the United States in *United States v. Washington*.[61] The United States and numerous tribes alleged violations of treaty-protected fishing rights over the course of many years and throughout western Washington. The State asserted that action and inaction by the

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[56] *Id.* at 1131.

[57] *Id.* at 1131-32 (citation omitted) (emphasis added).

[58] 332 F.3d 574 (9th Cir. 2003).

[59] *Id.* at 578.

[60] *Id.* at 581-82 (emphasis added).

[61] 853 F.3d 946, 966-68 (9th Cir. 2016).

United States rendered the treaty rights unenforceable. The court analyzed the State's argument as contending that the United States had partially abrogated the treaties' reservation of the tribal fishing right. Rejecting that argument, the court found that the United States "may abrogate a treaty with an Indian tribe only by an Act of Congress that 'clearly express[es an] intent to do so.'"[62] In stressing that only Congress had the authority to abrogate, the court in effect rejected the argument that abrogation authority resided in any other branch of government. Based on that finding, the court concluded that "[t]he United States cannot, based on laches or estoppel, diminish or render unenforceable otherwise valid Indian treaty rights." [63] The same reasoning applies to *Winters* Rights. Such property rights, once created, are not subject to loss except through clear congressional action.

In sum, the list of Ninth Circuit cases rejecting the availability of equitable defenses to *Winters* Rights claims by the United States and Indian tribes is long and compelling. It joins an equally imposing list of Supreme Court cases also rejecting equitable defenses. The law is clear. When the United States and Indian tribes seek recognition or the protection of *Winters* Rights and other reserved rights, both the Supreme Court and the Ninth Circuit, in this case and many others, have held that equitable defenses are *never* available against the United States' and Indian tribes' claims. Defendants' alleged equitable defenses against Plaintiffs' water right claims in this case are without basis, and Plaintiffs are entitled to judgment on the pleadings now.

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[62] *Id*. at 967 (quoting *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202, 119 S. Ct. 1187, 143 L. Ed. 2d 270 (1999).

[63] *Id.* (citations omitted)). The court went even a step further, stating that "[t]he same is true for waiver. Because the treaty rights belong to the Tribes rather than the United States, it is not the prerogative of the United States to waive them." *Id*.

4. *City of Sherrill* does not support Defendants' assertion of equitable defenses against Plaintiffs' asserted *Winters* Rights.

Over the last fifteen years, the United States has faced a new variation of the equities argument based upon the Supreme Court decision in *City of Sherrill v. Oneida Indian Nation of New York.*[64] Defendants here will undoubtedly argue, like others, that *Sherrill* – to which the United States was not a party – impliedly overruled *all* authority outlined above, such that equitable defenses are now available against the United States when it asserts *Winters* Rights claims. *Sherrill*, however, did not address claims of the United States, much less overturn the controlling federal precedent that prohibits consideration of equitable defenses here.

Sherrill was a tax case concerning tribal sovereignty and governance issues. In the late 18th and 19th Centuries, the Oneida Indian Nation ("OIN") had negotiated agreements with the State of New York, without the participation of the United States, to sell aboriginal lands in violation of the Nonintercourse Act.[65] Some 200 years later, OIN repurchased some parcels on the open market and brought an action against the City of Sherrill and county governments. OIN claimed exemption from property taxes on the theory that their purchase of fee title to these lost lands "unified fee and aboriginal title" such that OIN "may now exercise sovereign dominion over the parcels."[66] Characterizing OIN's action as a "unilateral" attempt to assert sovereign jurisdiction, the Court held that equitable considerations, namely the acquiescence doctrine, precluded the unique equitable remedy

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[64] *City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 197, 125 S. Ct. 1478, 161 L. Ed. 2d 386 (2005) (*Sherrill*).

[65] Act of July 22, 1790, ch. 33, 1 Stat. 137 (codified as 25 U.S.C. § 177).

[66] *Sherrill*, 544 U.S. at 202-05.

sought by OIN – an injunction enforcing tribal sovereignty over reacquired lands lost for almost 200 years.[67]

Sherrill stands for a narrow proposition – largely limited to its facts – that equitable defenses may apply against a tribe unilaterally seeking an injunction to strip local governments of authority over lands relinquished by the tribe two centuries previously. *Sherrill* is readily distinguishable from this case in several respects: (i) *Sherrill* did not involve vested property rights held in trust by the United States; (ii) *Sherrill* did not involve vested *Winters* Rights; and (iii) the tribal plaintiffs in *Sherrill* sought an injunction in order to exercise "ancient sovereignty" over reacquired lands not held in trust.

First, *Sherrill* is not applicable here because the case did not involve resources held in trust for a tribe by the United States. In fact, the Court in *Sherrill* stated that OIN could exert sovereign authority over its reacquired lands, making them exempt from state taxation, if the lands were taken into trust by the Secretary of the Interior.[68] This distinction is dispositive because settled Supreme Court case law, Ninth Circuit case law, and the law of this case, establishes that equitable defenses simply do not apply to the United States acting in its sovereign capacity to assert claims to establish and quantify *Winters* Rights.[69]

Second, the *Sherrill* decision did not mention, touch upon, or concern *Winters* Rights or other vested federal reserved rights and cannot be understood as having disturbed, through

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[67] *Id.* at 220-1.

[68] *Sherrill*, 544 U.S. at 220–21. In addition, the Court did not alter its holding in *Oneida Indian Nation v. United States*, 470 U.S. 226, 105 S. Ct. 1245, 84 L. Ed. 2d 169 (1985) ("*Oneida II*"), that tribes may bring suits for damages under federal common law for the unlawful dispossession of their land.

[69] *See* subsection III.A.1-3, *supra*.

complete silence, the long line of controlling federal cases that have explicitly and repeatedly rejected consideration of equitable defenses in establishing such rights.[70] Courts may not assume by implication that Supreme Court precedent has been overruled but must follow controlling precedent, leaving to the Court "the prerogative of overruling its own decisions."[71] Indeed, the Court in *Sherrill* did not purport to overturn *any* prior precedent. Rather, the Court viewed its opinion as addressing an issue that had no applicable precedent.[72] In contrast, application of equitable principles to deny the existence of or limit *Winters R*ights would require overturning established, long-standing Supreme Court precedent.

Finally, the acquiescence doctrine applied by the Court in *Sherrill* relates only to the long-delayed exercise of sovereignty by an Indian tribe or a state. As explained by the Court, the rule in sovereignty disputes between states is that "long acquiescence may have controlling effect on the exercise of *dominion and sovereignty over territory*."[73] The *Sherrill* Court applied this rule to OIN, reasoning that too much time had passed since it exercised sovereignty over the reacquired lands:

> This Court's original-jurisdiction state-sovereignty cases do not dictate a result here, but they provide a helpful point of reference: When a party belatedly asserts *a right to present and future sovereign control over territory*, longstanding observances and settled expectations are prime considerations. There is no dispute that it has been two centuries since the Oneidas last exercised regulatory control over the properties here or held them free from

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[70] *See id.*

[71] *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989).

[72] *See Sherrill*, 544 U.S. at 213 (In prior proceedings, the Court had "reserved for another day" the question whether "equitable considerations should limit the relief available to the present-day Oneidas.").

[73] *Id.* at 218 (emphasis added).

> local taxation. Parcel-by-parcel revival of their sovereign status, given the extraordinary passage of time, would dishonor "the historic wisdom in the value of repose."[74]

Thus, the ruling in *Sherrill* was grounded in rekindling "ancient sovereignty" of tribes and states.[75] The acquiescence doctrine applied by the Court in *Sherrill* has no application against the United States, and it has been asserted by no Defendant in this case. Here, the United States is asserting a claim for water rights, exercising its sovereignty over resources it holds in trust for the Tribe. Compounding the distinction with *Sherrill*, Plaintiffs here are not seeking equitable relief. In *Sherrill*, the OIN sought injunction against state and local governments, calling upon the Court's equitable powers to uphold the tribe's sovereign jurisdiction.[76] In this case, in contrast, Plaintiffs seek a determination of reserved rights created under federal law; if they exist, they fall in priority, some pre-dating and some post-dating other water users.

B. The *Winters* Doctrine applies to groundwater.

Defendants assert as an affirmative defense that the *Winters* Doctrine does not apply to groundwater sources.[77] Once again, Defendants' assertion here is contrary to controlling, recent Ninth Circuit case law. This affirmative defense concerns whether *Winters* Rights include groundwater underlying reserved lands. In *Agua Caliente Band of Cahuilla Indians v. United States*, the Ninth Circuit squarely addressed this issue and held that the *Winters* Doctrine applies

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[74] *Id.* at 218-219 (emphasis added) (quoting *Oneida II*, 470 U.S. at 262 (1985) (Stevens, J., dissenting in part)).

[75] *See id.* at 202-03.

[76] *Id.* at 214.

[77] *See* Exhibit 1.

equally to surface and underground water sources necessary for a homeland on an Indian reservation.[78] Because *Agua Caliente* is controlling circuit authority,[79] this affirmative defense fails as a matter of law, and Plaintiffs are entitled to judgment on the pleadings.

In *Agua Caliente*, the question was "whether the [Agua Caliente Band of Cahuilla Indians] ha[d] a federal reserved right to the groundwater underlying its reservation."[80] Defendants in that case argued that *Winters* Rights do not apply to groundwater – the same argument raised here by Defendants' affirmative defenses. After determining that the United States impliedly reserved water when it established the reservation,[81] the court turned to whether the *Winters* Doctrine applies to groundwater. Finding no controlling federal appellate authority, the court reasoned that "the *Winters* [D]octrine was developed in part to provide sustainable land for Indian tribes whose reservations were established in the arid parts of the country."[82] The court noted that many of these reservations lacked access to, or were unable to effectively capture, regular supplies of surface water.[83] "Given these realities," the court concluded, "we

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[78] *Agua Caliente*, 849 F.3d at 1265.

[79] *Hart v. Massanari*, 266 F.3d 1155, 1170 (9th Cir. 2001) ("Circuit law … binds all courts within a particular circuit, including the court of appeals itself.").

[80] *Agua Caliente*, 849 F.3d at 1267.

[81] *Id.* at 1270.

[82] *Id.* at 1271.

[83] *Id.*

can discern no reason to cabin the *Winters* [D]octrine to appurtenant surface water."[84] The court held that the *Winters* doctrine encompasses both surface water and groundwater.[85]

The Ninth Circuit has already determined that the United States impliedly reserved water when it established the Walker River Reservation as it existed at the time of the original litigation.[86] Through the course of the current proceedings, this Court will need to make similar determinations with respect to the additional water rights not addressed by the 1936 Decree. If the Court concludes that the United States did not also reserve this additional water, the *Winters* Doctrine does not apply. Where the Court concludes that water was reserved, however, the Ninth Circuit decision in *Agua Caliente* makes clear that the *Winters* Doctrine applies to both surface and groundwater. Therefore, Defendants' affirmative defense that the *Winters* Doctrine does not apply to groundwater is baseless and contrary to controlling authority. This affirmative defense fails as a matter of law, and Plaintiffs are entitled to judgment on the pleadings.

C. The United States retained the power to reserve unappropriated waters after the State of Nevada was created in 1864.

Plaintiffs' Amended Counterclaims assert various priority dates because the *Winters* Rights arose at different times; some of these rights arose prior to the State of Nevada's

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[84] *Id.*

[85] *Id.*

[86] *Walker III*, 104 F.2d 334, 339–40 (9th Cir. 1939) ("We hold that there was an implied reservation of water to the extent reasonably necessary to supply the needs of the [Walker River Paiute] Indians."). This determination specifically applies to those lands reserved and held in trust since 1859. Unlike the proceedings leading to the 1936 Decree, in the current proceedings Plaintiffs pursue groundwater rights tied to these 1859 lands as well as water rights for those lands reserved by subsequent executive order and congressional acts without restriction: Executive Order No. 2820, March 15, 1918; Act of January 6, 1928, 45 Stat. 160; and Act of June 22, 1936, 49 Stat. 1806-07. Today, these lands form a single, consolidated homeland for the Tribe.

existence in 1864, but most of these rights arose after.[87] Defendants seek to preclude this second, larger group of reserved water rights based on a purported theory that, post-statehood, the United States lacked authority to reserve the right to use unappropriated water for the benefit of and use on federal land.[88] Defendants' assertions here are, again, contrary to controlling case law. The issue that Defendants raise here was specifically addressed and resolved by the Supreme Court long ago.

The Supreme Court has determined that the power of the United States to reserve water rights is unaffected by a state entering the Union. From the time that reserved rights were first conceptualized, the Supreme Court firmly embraced the federal government's ability to at any time reserve those water rights needed to fulfill the purpose of federal lands.

> [I]n the absence of specific authority from congress, a state cannot, by its legislation, destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters, so far, at least, as may be necessary for the beneficial uses of the government property.[89]

The fact that states might have the ability to pass legislation to manage or control the use of water within a state had no bearing on the issue of the United States' authority.[90]

From this first articulation of what would later become the *Winters* Doctrine, reserved rights were firmly grounded in federal law. In *Winters* itself, the Supreme Court was asked whether the United States had reserved water for use on the Fort Belknap Reservation. In that seminal case, opponents argued, among many other things, that even if a water right had been

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[87] *See* Section I, *supra*.

[88] *See* Exhibit 1.

[89] *United States v. Rio Grande Dam & Irr. Co.*, 174 U.S. 690, 703, 19 S. Ct. 770, 43 L. Ed. 1136 (1899).

[90] *Id.*

previously reserved, that reservation of water was "repealed by admission of Montana into the Union … upon equal footing with the original states."[91] The Supreme Court squarely rejected that contention, declaring:

> *The power of the government to reserve the waters* and exempt them from appropriation under the state laws *is not denied, and could not be*. That the government did reserve them we have decided, and for a use which would be necessarily continued through years.
> . . . .
> Appellants' argument upon the incidental repeal of the [Fort Belknap] agreement by the admission of Montana into the Union, and the power over the waters of Milk river which the state thereby acquired to dispose of them under its laws, is elaborate and able, but our construction of the agreement and its effect make it unnecessary to answer the argument in detail.[92]

In 1963, the Court again affirmed the power of the federal government to impliedly reserve water rights for use on Indian reservations regardless of the timing.[93] In *Arizona I*, the State of Arizona complained that the federal government had no power to reserve water rights for Indian tribes after statehood.[94] The Court, in expressly rejecting this contention, found that the United States held "broad" powers to reserve necessary water to serve federal lands both under the Commerce Clause's authority to regulate navigable waters[95]and the Property Clause's authority to regulate federal lands. [96] The Court concluded, as it had before, "we have *no doubt*

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[91] *Winters*, 207 U.S. at 577.

[92] *Id.* at 577-78 (emphasis added).

[93] *Arizona I*, 373 U.S. at 597-98.

[94] Arizona was admitted to the Union in 1912.

[95] U.S. const. art. I, § 8.

[96] U.S. const. art. IV, § 3.

about the power of the United States under these clauses to reserve water rights for its reservations and its property."[97]

Again in 1971, the Court recognized the United States' power to impliedly reserve water rights in non-navigable streams under federal law at any time.[98] In *United States v. District Court, County of Eagle, Colorado*, the United States challenged whether a state adjudicative court could require the United States to assert and defend water rights that it had reserved under federal law, namely *Winters* Rights. The Court began its analysis right where it had left off in *Arizona I*:

> It is clear from our cases that the United States often has reserved water rights based on withdrawals from the public domain. As we said in [*Arizona I*], *the Federal Government had the authority both before and after a State is admitted into the Union* 'to reserve waters for the use and benefit of federally reserved lands.' The federally reserved lands include any federal enclave.[99]

We are aware of no other federal case challenging the United States' power to reserve water rights in a state after statehood. The lack of case law over the past approximately fifty years on this point does not reflect ambiguity or uncertainly on this issue after 1971, but just the opposite: the issue is *settled* and the date of statehood has *no effect* on the United States' ability to reserve water under federal law to serve the purpose of a federal reservation. Defendants' argument is a remarkable, unsupported challenge to plainly stated and long-established Supreme Court precedent.

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[97] *Id*. at 598 (emphasis added).

[98] *United States v. District Ct., County of Eagle, Colorado*, 401 U.S. 520, 91 S. Ct. 998, 28 L. Ed. 2d 278 (1971) (*Eagle County*).

[99] *Id.* at 522-23 (emphasis added) (citations omitted).

In the end, Defendants' affirmative defense that the United States is without power to reserve water rights for use on the Reservation since Nevada became a state is contrary to unambiguous and long-standing Supreme Court precedent. This affirmative defense therefore fails as a matter of law. Plaintiffs are entitled to judgment on the pleadings.

D. Plaintiffs' claims are not barred by claim or issue preclusion.

Defendants also assert the affirmative defense that Plaintiffs' water right claims are barred by the doctrines of claim and issue preclusion.[100] In *Walker IV*, the Ninth Circuit held that because "the counterclaims are not a new action, traditional claim preclusion and issue preclusion *do not apply*."[101] The law of the case doctrine squarely applies here, and this Court is not at liberty to reconsider whether claim and issue preclusion might apply to the claims.[102] Because these preclusion-based defenses – also known as res judicata and collateral estoppel respectively – are inapplicable to Plaintiffs' claims, Plaintiffs are entitled to judgment on the pleadings.

In expressly rejecting claim and issue preclusion here, the Ninth Circuit first found that Plaintiffs' Amended Counterclaims set forth new claims that were not litigated in the original decree proceedings of the 1920s and 1930s and held that consideration of those claims is today within the district court's jurisdiction to modify the 1936 Decree:

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[100] *See* Exhibit 1; *see also, e.g., Answer of Defendants Lyon County, Mono County and Centennial Livestock to Second Amended Counterclaim of the Walker River Paiute Tribe* at 9 (Aug. 1, 2019) (ECF No. 2521) (asserting 11th affirmative defense that Tribe's claimed reserved right in groundwater could have been, but was not, adjudicated in the Walker River Decree, therefore, the doctrine of res judicata bars the Tribe from asserting additional reserved rights in groundwater) (citing *Nevada v. United States*, 463 U.S. 110, 129-130, 103 S. Ct. 2906, 77 L. Ed. 2d 509 (1983)).

[101] *Walker IV*, 890 F.3d at 1172. (emphasis added).

[102] *See Thomas*, 983 F.2d at 154.

> The better reading of Paragraphs XI and XII is that, together, they reiterate standard preclusion principles, *i.e.*, that no party may relitigate a claim to water rights in the Walker River Basin, in the Nevada District Court or any other court, that was litigated in the original case as of April 14, 1936.[103]

It then held that claim and issue preclusion are inapplicable to Plaintiffs' claims:

> Because we have concluded that the counterclaims are not a new action, traditional claim preclusion and issue preclusion do not apply. *See Arizona v. California*, 460 U.S. 605, 619 (1983) ("*[R]es judicata* and collateral estoppel do not apply ... [where] a party moves the rendering court in the same proceeding to correct or modify its judgment.").[104]

Applying claim and issue preclusion to the Amended Counterclaims here would render the Ninth Circuit's recent *Walker IV* decision meaningless. The Ninth Circuit expressly held that this Court has jurisdiction to consider the Amended Counterclaims because the water rights asserted in them were never litigated, and consideration of those claims does not constitute re-litigation of a prior asserted claim. None of the parties to this case sought review of the Ninth Circuit's decision. And since this Court last addressed this defense, the parties still have not litigated the claims. Therefore, the determination that "traditional claim preclusion and issue preclusion do not apply" is final, binding, and the law of this case.[105] This Court is precluded from reconsidering such defenses.[106]

Defendants' assertion that Plaintiffs' Amended Counterclaims are barred by claim and issue preclusion must fail, and Plaintiffs are entitled to judgment on the pleadings.

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[103] *Walker IV*, 890 F.3d at 1171-72. No Defendant contends that the Plaintiffs' claims were already litigated in the original case.

[104] *Id.* at 1172-73.

[105] *See Thomas*, 983 F.2d at 154 (precluding reconsideration of an issue "already decided by . . . a higher court in the identical case").

[106] *Walker IV*, 890 F. 3d at 1172.

IV. CONCLUSION

For the reasons articulated in the paragraphs above, Plaintiffs are entitled to judgment on the pleadings at this time, and this Court should enter judgment against Defendants.

Respectfully submitted this 20th day of February, 2020.

/s/ Andrew "Guss" Guarino
Andrew "Guss" Guarino

Attorney for the United States

CERTIFICATE OF SERVICE

It is hereby certified that on February 20, 2020 service of the foregoing was made through the court's electronic filing and notice system (ECF) to all of the registered participants.

Further, pursuant to the Superseding Order Regarding Service and Filing in Subproceeding C-125-B on and by All Parties (ECF 2100) at 10 ¶ 20, the foregoing does not affect the rights of others and does not raise significant issues of law or fact. Therefore, the United States has taken no step to serve notice of this document via the postcard notice procedures described in paragraph 17.c of the Superseding Order.

By: /s/ Andrew "Guss" Guarino
Andrew "Guss" Guarino